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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

E. M. AYRES, Plaintiff in Error,

vs. No. 310.

JOHN H. POLSDORFER AND WIFE, Defendants in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE DEFENDANTS IN ERROR ON MOTION TO DISMISS AND TO AFFIRM.

WM. M. RANDOLPH,
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WASSELL RANDOLPH,
Attorneys for Defendants in Error.

PAUL & DOUGLASS, PRINTERS

Supreme Court of the United States.

OCTOBER TERM, 1902.

MOTION.

And now come the defendants in error, and move the Court to dismiss the writ of error herein, for the following reason:

Because the jurisdiction of the United States Circuit Court was originally invoked solely on the ground that the parties to the suit were citizens of different States, and as the decision of the Circuit Court of Appeals in all such cases is made final by statute, no writ of error can be sued out to bring such a case from the Circuit Court of Appeals to this Court.

And the defendants in error move the Court further, to affirm the judgment of the Circuit Court of Appeals for the following reason: Because the only question that could be considered by this Court, if the case was properly before it, is whether the judgment of the Circuit Court of Appeals in dismissing the writ of error to the Circuit Court below on the motion of the defendants in error was erroneous, and as the record clearly shows that such judgment was entirely correct, the same should be affirmed.

STATEMENT OF FACTS.

This is a real action under the statute of the State of Tennessee, brought by John H. Polsdorfer and Louisa M. Polsdorfer, his wife, as owners in possession, against E. M.

Ayres, Joe C. Marley, Thos. Price, E. J. Roy, T. A. Roy and L. R. Coleman, unlawfully setting up title to, and exercising acts of ownership over the land, October 15, 1898, in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis.

The declaration alleges:

"The plaintiffs, who are citizens of the State of Indiana, residing at Evansville, therein, complain of the defendants, Joe C. Marley, Thos. Price, E. J. Roy, T. A. Roy, L. R. Coleman and E. M. Ayres, who are citizens of the State of Tennessee, residing in the Western Division of the Western District thereof, in an action of trespass and ejectment.

"For that heretofore, to-wit: On October 1, 1898, the plaintiffs were lawfully entitled in fee and were in possession of the following described property situated in the County of Lauderdale, in the said District, to-wit: 2,150 acres of land in the said county situated in the low lands of the Mississippi river above Fort Pillow and north of Cole Creek, bounded as follows, to-wit:

(Then follows a description by metes and bounds of the first tract of land.)

"And also the following described land lying in the said County of Lauderdale, in the Mississippi river bottom above Fort Pillow and north of Cole Creek, and bounded as follows, to-wit:

(Then follows a description by metes and bounds of the second tract.)

"And also the following tract of land situated in the said County of Lauderdale, the same being an alleged island in the Mississippi river, and the south end of said alleged island is near to and about north or perhaps west of north of L. R. Coleman's warehouse at Fort Pillow, in said county, and some hundreds of yards distant from the

same, estimated to be from 300 to 500 yards distant, and bounded as follows:

(Then follows a description by metes and bounds of the third tract.)

The declaration then continues:

"All of the said property is of the value of exceeding $3,000.00. And the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to-wit: On the said October 1, 1898, at the said County of Lauderdale, unlawfully, and without right, entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same, and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do.

"Wherefore the plaintiffs have been injured and damaged to the amount of $3,000.00, and they bring their suit for the recovery of the said lands and the said damages." (R., pp. 2-4.)

The defendant, Joe C. Marley, filed a disclaimer, and on this the suit was dismissed as to him. (R., p. 6.) L. R. Coleman filed no pleas, nor made his appearance in any way.

The defendant, Thos. Price, filed the following pleas: "And now the defendant, Thomas Price, for plea comes and says he is not guilty of wrongfully withholding the premises from plaintiffs, which they claim in their declaration in this suit."

"And for further plea, defendant, Thos. Price, comes and pleads he is not guilty of cutting and removing any timber from the lands of plaintiffs, as they have alleged in

their declaration." (R., pp. 5-6.) E. J. and T. A. Roy filed similar pleas. (R., p. 5.)

The defendant, E. M. Ayres, filed the following pleas: "(1) And now comes the defendant, E. M. Ayres, and for plea says he is not guilty of the matter in plaintiffs' declaration alleged.

"(2) And for further plea the defendant says that plaintiffs' action accrued more than seven years before suit brought." (R., p. 7.)

On all the above pleas plaintiffs joined issue. The case went to trial, and resulted in a verdict for plaintiffs for certain tracts of land described therein against E. M. Ayres and Thos. Price. No land was recovered from E. J. and T. A. Roy. (R., pp. 8-12.)

The defendant, E. M. Ayres, applied for and obtained a writ of error from the Circuit Court of Appeals for the Sixth Circuit, assigning numerous errors not necessary to be mentioned here. The writ of error was obtained without any severance as to Thos. Price, and without anything appearing in the record showing notice to him, or that he was summoned to appear in the Circuit Court of Appeals. (R., pp. 273-278.)

In that Court the defendants in error (the plaintiffs below), filed a motion to dismiss the writ of error: "Because the defendant, Thos. Price, against whom there is a joint judgment with plaintiff in error, E. M. Ayres, has not joined in said writ of error, and no reason is shown in the record for his not doing so, nor does the record show that any request was made of him to join, or refusal on his part to do so." (R., pp. 279-280.)

The cause was later heard in the Circuit Court of Appeals, and on December 4, 1900, the writ of error was dismissed in pursuance to the motion. (R., pp. 281-282.)

A petition for rehearing was filed during the term,

which was denied February 23, 1901 (R., pp. 290-297), and thereupon a writ of error to the United States Supreme Court was applied for by E. M. Ayres and allowed by one of the Justices of this Court. (R., pp. 298-300.)

(The opinion of the Circuit Court of Appeals is in the record at pp. 283-289, and will be found also in 105 Federal Reporter, p. 737.)

BRIEF.

ON MOTION TO DISMISS.

(1)

By the Act of March 3, 1891, to establish the Circuit Courts of Appeal, it is provided that "the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States, etc." (Supp. Rev. Stat. of U. S., Vol. 1 (2d Edn.), Sec. 6, p. 903.)

When the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset from the declaration or the bill of the party suing, that the suit is of that character—in other words it must appear in that class of cases that the suit was one of which the Circuit Court, at the time its jurisdiction was invoked, could properly take cognizance.

Metcalf vs. Watertown, 128 U. S., 507.
Mining Co. vs. Turck, 150 U. S., 143.
Borzmeyer vs. Idler, 159 U. S., 412.
Railway Co. vs. Lewis, 173 U. S., 457.
Pope vs. R. R. Co., 173 U. S., 578.
Muse vs. Hotel Co., 168 U. S., 436.
R. R. Co. vs. Bell, 176 U. S., 325, and cases there cited.

The declaration in the present case invoked the jurisdiction of the Circuit Court below solely on the ground of diverse citizenship—that the plaintiffs were citizens of the State of Indiana, and that all the defendants were citizens of the State of Tennessee. It did not appear therefrom that jurisdiction was rested, or could be asserted on any other ground. Therefore the judgment of the Circuit Court of Appeals was final.

Mining Co. vs. Turck, Supra.
Borzmeyer vs. Idler, Supra.
Railway Co. vs. Lewis, Supra.
Pope vs. R. R. Co., Supra.
R. R. Co. vs. Bell, Supra.
Huguley, etc., Co. vs. Galeton, 184 U. S., 291.
Pub. Co. vs. Monroe, 164 U. S., 111.
Construction Co. vs. R. R., 148 U. S., 372.
Benjamin vs. New Orleans, 169 U. S., 161.
Rouse vs. Getcher, 156 U. S., 47.
Rouse vs. Hornsby, 161 U. S., 588.
Refining Co. vs. New Orleans, 181 U. S., 281.
Robinson vs. Caldwell, 165 U. S., 359.

(2)

The sole ground for suing out this writ of error, as stated in the petition therefor, was "that the record in this cause shows that petitioner claimed under muniments of

title from the State of Arkansas, and Polsdorfer and wife, and also Price, claimed under muniments of title from the State of Tennessee. In other words petitioneer claims that he has a right to the writ of error under the Constitution of the United States, Article 3, Section 2." (R., p. 300.)

In the case of Mining Co. vs. Turck, Supra., Mr. Chief Justice Fuller said:

"From Wiscart vs. D'Archy, 3 Dall. 321, to American Construction Co. vs. Jacksonville Railway Co., 148 U. S., 372, it has been held in an uninterrupted series of decisions that this Court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject."

150 U. S., 141.

It is provided in Section 4 of the Judiciary Act of March 3, 1891, that "all appeals by writ of error or otherwise, from said District Courts shall only be subject to review, in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States, or in the Circuit Court of Appeals hereby established according to the provisions of this act regulating the same."

Supp. to Rev. Stat. of the U. S., Vol. 1 (2d Edn.), p. 903.

The same Act, in Section 6, provides: "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

Id., p. 904.

In order to support this writ of error, plaintiff in er-

ror must show that the judgment of the Circuit Court of Appeals was not final and that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States. Plaintiff in error has attempted to do this by asserting that this is a controversy between citizens of the same State claiming lands under grants of different States, because in such cases the judgment of the Circuit Court of Appeals is not made final by statute.

Admitting for argument that such a question is raised on this record, the plaintiff in error, however, is not entitled to this writ of error. Nothing whatever is stated in the declaration about the parties to the suit claiming lands under grants of different States. The pleas are simply general pleas of "not guilty," and a plea of the Statute of Limitations. Issues were joined on the pleas, and the case was tried on the issues. On the trial Polsdorfer and wife deraigned title through W. W. Woodfolk, to whom the State of Tennessee granted a part of the land claimed by them. They also deraigned title through other grantees from the State of Tennessee. The defendant, Thos. Price, introduced certain grants from the State of Tennessee as evidence of his title, and the defendant, Ayres, introduced certain tax deeds made by officials of Mississippi county, Arkansas, as evidence of his title to the land. The first time it appeared in this record, how the parties claimed the land in controversy respectively, was when, on the trial, they introduced their evidence in support of their claims of title.

To maintain this writ of error on the ground that the parties claim under grants from different States, the Court will have to hold that this question may be raised by the evidence, and the effect of such ruling will be that on a claim of jurisdiction on that ground reference may be made

to the entire pleadings, the evidence and the rulings of the Court below. This view would ignore the settled doctrine that the inquiry into the jurisdiction of the Circuit Court is limited to the facts appearing on the record in the first instance. The error in the argument is manifest. The jurisdiction attached on the filing of the declaration and could not be affected by the subsequent developments. It depended entirely upon the diverse citizenship as it appeared in the record when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

Mining Co. vs. Turck, 150 U. S., 144.

See also cases first cited in brief.

(3)

Counsel is in error in assuming that his client is entitled to this writ of error on the ground set out in his petition. The article of the Constitution to which he refers expressly states that to give a Federal Court jurisdiction the persons must claim the land "under *grants* of different States." It is true that Polsdorfer's title goes back to the Woodfolk grant and other grants from the State of Tennessee (R., p. 13), and that Price claims title to the land by grants from the same State. (R., pp. 114-117.) Ayres set up no grant whatever—in fact he could not. He claimed that the land was in Arkansas, but the evidence he introduced to support this contention shows conclusively that the land he claimed was never granted by the State of Arkansas, or any other State. He introduced a book from the office of the Clerk of Mississippi County, Arkansas, showing the entries of fractional sections 17 and 18, by D. Hardiman, in 1836, and also showing the entry of fractional sections 19 and 20, by J. C. Barnes, in 1846—all said fractional sections being in Township 12 North, Range 12 East. (R., pp. 148 and 232.) This is the land claimed

by him, and it was in the Louisiana Purchase, and in the State of Arkansas. He also introduced patent No. 3750, of date February 1, 1843, by which the United States conveyed to D. Hardiman, and patent No. 4780, of date May 12, 1857, by which it conveyed to John C. Barnes the land entered by each. (R., pp. 230-232.)

Ayres does not deraign title back to these patents, for his title is far more recent, being purely a tax title. He claims the land through John A. Lovewell, who purchased it at a tax sale about 1884, for taxes due the State of Arkansas. The deed to Lovewell is of date July 22, 1884. (R., pp. 145-147.) The deed from Lovewell and wife to Ayres is of date August 2, 1884. (R., pp. 149-151.)

The only other deeds Ayres introduced in evidence are four tax deeds to him from H. D. Tomlinson, Clerk County Court, Mississippi county, Arkansas, and all of which are based on sales for taxes due the State of Arkansas and County of Mississippi.

It is manifest therefore that neither the State of Arkansas nor any other State ever had the title paramount to the land claimed by Ayres, and consequently no grant could have been made by the State of such land. Tax deeds are not *grants* from the State levying the taxes. This fact alone defeats his right to this writ of error on the ground he attempts to take advantage of. The most that can be said is that Ayres, as he states in his petition for this writ of error, "claims under *muniments of title* from the State of Arkansas." Such a claim does not meet the requirements of the Constitution, Article 3, Sec. 2. relied on by Ayres, as the portion of that Article referred to specifically calls for "grants," contemplating grants from the State as a sovereign, made in the exercise of its sovereign power, and professing to pass a title belonging to the State in that character.

The portion of Article 3, Sec. 2 of the Constitution relied on by plaintiff in error to support this writ of error, requires that in order to give the Federal Courts jurisdiction, in controversies involving lands claimed under grants of different States, there must be the additional qualification that the litigants are citizens of the *same* State. The reason of this restriction is plain. Previously in the same Article and Section, there is the broad provision that the jurisdiction of the Federal Courts extends to controversies "between citizens of different States."

Manifestly there was no necessity to make a special provision giving the Federal Courts jurisdiction in controversies between citizens of *different* States claiming lands under *grants* from different States, because in such cases such Courts acquire jurisdiction by virtue of the provision in regard to diverse citizenship without reference to the cause of action. (Pope vs. R. R., 173 U. S., 576.) The framers of the Constitution unquestionably recognized this fact and also recognized the additional fact that controversies would arise between citizens of the *same* State, claiming lands under grants from different States. In such cases the Federal Courts could not acquire jurisdiction under the provision in regard to diverse citizenship, because that requisite did not exist. Nevertheless, they realized that as the rights of the two States to grant the land must, in the absence of a special provision, be drawn into question in one of them, and neither of the two States ought to decide the controversy, that it was peculiarly a question for determination by the Federal judiciary. To meet such cases they inserted in the Constitution the provision above referred to, that in controversies "between citizens of the *same* State, claiming lands under grants of different States," the Federal Courts should have jurisdiction.

Now, to come within this provision so as to give the Federal Courts jurisdiction by virtue thereof, both requisites, concurrent citizenship, and the cause of action specified, must be present. In the case at bar, neither the specified cause of action (as we have shown above), nor concurrent citizenship as a matter of fact exists because Polsdorfer and wife are citizens of the State of Indiana, and all the persons sued by them are citizens of the State of Tennessee. Thus, it is clearly shown that the only ground on which the Circuit Court below acquired jurisdiction, whether tested by the record, or by the facts outside, was that of diverse citizenship, and hence we are brought back to our proposition argued first, that the writ of error must be dismissed because, in such cases, the judgment of the Circuit Court of Appeals is final.

(5)

Though Article 3, Section 2 of the Constitution prescribes to what cases the judicial power of the United States shall extend, it required an Act of Congress to create all Federal Courts, and to prescribe the jurisdiction of each Court. Congress in conferring jurisdiction on the Federal Courts, in controversies "between citizens of the same State claiming lands under grants of different States," has done so only in the following manner: "If in any action commenced in a State Court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may State to the Court, and * * *" Then follows what must be done by the litigagants in order to enable the Court to determine whether or not any of them claim under grants of different States:

"And if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as herinbefore mentioned in this Act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district."

Supp. Rev. Stat., Vol 1 (2d Edn.), p. 613.

Our first contention is, that as *Congress* has not conferred original jurisdiction on any Fedearl Court, of controversies involving grants of land by different States to citizens of the same State, no suit can be brought in a Federal Court originally on that ground. The only way a Federal Court can acquire original jurisdiction of a controversy on such ground is that prescribed in the Act quoted viz: by removal from the State Court where such suit was brought. Therefore, this suit having been brought originally in the Federal Court, Ayres is precluded from ever setting up in it as the ground of the jurisdiction of the Circuit Court, or as the basis of this writ of error that the controversy involves grants of lands by different States.

Polsdorfer had the right to present his case as he saw fit, which he did by his declaration. Ayres, if he wished to raise the question that he and Polsdorfer claimed under conflicting grants of different States, and present it in the first instance as a Federal question, could have done so by a separate suit in the State Court, setting up that fact, and then have proceeded in accordance with the Act above quoted, to have the case removed to the Circuit Court of the United States.

If we are wrong in the above contention, we then submit he could have pursued the course of bringing a separate suit in the Federal Court against Polsdorfer, on the ground of diverse citizenship, and have set up therein the

fact that he and Polsdorfer claimed the lands under grants of different States. He would then have had to raise the question in the manner set out in the Act of Congress, viz: by stating to the Court, or making affidavit of the grant he claimed and relied upon, and by producing such grant or an exemplification thereof, and by moving the Court to compel the adverse persons to inform the Court whether they claimed the land under a grant from another State. Perhaps he might have set up the defence of conflicting grants of different States by plea in the present case, but if this had been done, he would have had to pursue the same course just narrated.

See: Blackburn vs. Portland G. M. Co., 175 U. S., 571.

He, however, failed to follow any of the above courses, and simply filed his pleas herein of "not guilty," and the Statute of Limitations, and went to trial thereon. Consequently as the question was never raised at any point in the case the Circuit Court could not have considered it. Counsel for plaintiff in error seemed to realize this fact, for the question was argued by him in neither the Circuit Court nor the Circuit Court of Appeals. He is trying to have the question considered here by setting it up in his petition, for the purpose of sustaining his right to the writ of error in a last attempt to have the entire case (as appears from his brief) reviewed in the Supreme Court. This Court will not consider any writ of error, the grounds for which were not properly laid in the foundation of the suit. It is not sufficient to present the question for the first time in the petition for the writ of error. Then it is too late.

C., H. & D. R. R. Co. vs. Thibaud, 177 U. S., 619-620.

The fact is, plaintiff in error has mistaken his remedy. This case, if subject to review in this Court at all, could

have been reviewed only by certiorari, as provided in the Act of Congress and as appears from the decisions.

Sec. 6, Ch. 517, Act of March 30, 1891, Revised Statutes U. S., Vol. 1 (2d Edn.), p. 903.

Kingman vs. Mnfg. Co., 170 U. S., 675.

Construction Co. vs. R. R., 148 U. S., 372.

Carter vs. Roberts, 177 U. S., 500.

Robinson vs. Caldwell, 165 U. S., 362.

The words in the Act "by certiorari or otherwise" add nothing to the power of this Court, for if some other order or writ might be resorted to, it would be *ejusdem generis* with certiorari. The writ is the equivalent of an appeal or writ of error as declared by the Statute, and it is issued in the discretion of the Court.

Huguley, etc., Co. vs. Galeton, 184 U. S., 295.

But the time for seeking relief by that means has now expired.

The Conquerer, 166 U. S., 110, 114.

ON MOTION TO AFFIRM.

(1)

We will now assume for the sake of argument solely, that this is a case which could properly be taken to this Court by writ of error from the Circuit Court of Appeals, and that by virtue of the writ of error sued out by Ayres, it is properly in this Court.

The motion to dismiss in the Circuit Court of Appeals was submitted with the brief on the merits, but the Court did not consider the case on the merits, and dismissed the writ of error solely on the motion. (R., p. 282.) The prayer in the petition for the writ of error is "for a writ of error, to the end that the errors intervening in the decision of the said United States Circuit Court of Appeals, Sixth

Circuit, may be corrected." (R., p. 299.)

The errors assigned are that the Court erred in (1) dismissing the writ of error on the motion; (2) in dismissing the petition for rehearing; and (3) in refusing to entertain jurisdiction of the cause and not reversing it upon the merits. (R., pp. 299-300.)

The third ground of exception, as we will argue later, cannot be considered. The second ground, if the opinion of the Circuit Court of Appeals is correct, is not well taken, and need not be argued, for no facts were brought out in the petition for the rehearing not considered by the Court in disposing of the motion. This statement can be verified by simply reading that petition. Hence, the only ground of exception of any moment is the first, which presents the question referred to in the prayer of the petition, viz: whether there was error in the *decision* of the Circuit Court of Appeals.

The general rule is that the whole case is open for examination upon a writ of certiorari issued by this Court.

R. R. Co. vs. Napier, 166 U. S., 280.

This applies, however, (in the case of a writ of certiorari to a Court of Appeal) only to the entire case that was considered by that Court in reaching its judgment. The restriction is the same in cases before this Court on error to the Court of Appeals.

In the case of Refining Co. vs. New Orleans, the Circuit Court of Appeals dismissed the case (on writ of error to the lower court) for want of jurisdiction because one of the defences was the unconstitutionality of an ordinance of the City of New Orleans. The jurisdiction of the United States Circuit Court rested solely on the ground of the diverse citizenship of the litigants. A petition was filed in this Court praying for a writ of certiorari, requiring the United States Circuit Court of Appeals to certify the case

to this Court for its review and determination; or in the alternative for a writ of mandamus to command the judges of said Court to try the case.

Leave was granted to file the petition, and a rule to show cause was thereupon entered, to which due return was made. Though the record was before the Court on the rule, and full argument was made, the Court did not consider the case on the merits, but only the correctness of the judgment of the Court of Appeals, and after fully considering this feature, was of the opinion that the judgment of the Court of Appeals dismissing the cause on the motion was erroneous. The following judgment was then entered by this Court in the cause:

"Writ of certiorari to issue; return to rule to stand as return to writ; judgment thereupon reversed and cause remanded with a direction to take jurisdiction and dispose of the cause."

181 U. S., 283.

A similar judgment would be entered in the present case, if the Court has jurisdiction, and the judgment of the Court of Appeals, dismissing the writ of error on the motion is considered by this Court to have been erroneous.

Plaintiff in error having sued out a writ of error to the Circuit Court of Appeals, that Court must pass upon the merits of the case before this Court can do so. The Judiciary Act of 1891 does not give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this Court and in the Circuit Court of Appeals. After a judgment by the latter Court on the merits, its judgment stands, unless reviewed by certiorari to, or appeal from that Court, in accordance with said Act.

Robinson vs. Caldwell, 165 U. S., 359.

Carter vs. Roberts, 177 U. S., 496.

R. R. vs. Thiebaud, 177 U. S., 615.

Huguley, etc., Co. vs. Galeton, 184 U. S., 290.

The Circuit Court of Appeals was satisfied that the motion to dismiss was well taken, and had no hesitation in dismissing the writ of error. Hence this Court is limited simply to a review of the correctness of the decision of the Circuit Court of Appeals on the motion upon the facts as presented by the record. If this Court should find that the decision of the Circuit Court of Appeals was erroneous, it will remand the cause to that Court for a judgment on the merits.

Refining Co. vs. New Orleans, 181 U. S., 281.

(2)

The suit brought by Polsdorfer was a joint suit against all the defendants for all the land, and not against each defendant for a part of the land.

The judgment in the lower Court, after setting out the joint verdict against all the defendants, describing the land recovered by the plaintiffs from them jointly, adjudged that "the plaintiffs do have and recover of and from the defendants severally, the lands hereinbefore described, found by the verdict of the jury to belong to them in fee, * * * * *."

As stated above, no land was recovered from the defendants, E. J. Roy and T. A. Roy—they not claiming the land recovered. The suit was dismissed as to Marley, and Coleman made no appearance. As to the remaining defendants, Thomas Price and E. M. Ayres, manifestly, as appears from the record, the judgment for the land recovered was against both of them. In other words it was a joint judgment, in the sense of the law, against Thomas Price and E. M. Ayres; that is, an entire judgment against each of them for all the land.

See: Humes vs. Bank, 54 Fed. Rep., p. 917.
Masterson vs. Herndon, 10 Wall., p. 416.
Hedges vs. Seibert, 50 Fed. Rep., p. 643.
Hampton vs. Rouse, 13 Wall., p. 187.

It appears from the record that the writ of error was sued out by E. M. Ayres alone, and although the judgment was obtained for all the land against him and his co-defendant, Thomas Price, no mention at all is made in Ayres' petition for the writ of error, or in the writ of error, of Thomas Price, or that he refused to join in the writ of error, or that he knew anything at all of the same being sued out.

It is the established doctrine of the Federal Courts that in cases at law where the judgment is joint, all the parties against whom it is rendered must join in the writ of error, and in Chancery cases all the parties against whom a joint decree is rendered must join in the appeal, or the writ of error or appeal will be dismissed.

See: Masterson vs. Herndon, Supra.
Hardee vs. Wilson, 146 U. S., p. 179.
Downing vs. McCartney, 131 U. S., App., p. 98.
R. R. Co. vs. Evans, 175 U. S., p. 723 (A).
Mussina vs. Cavazos, 20 How., p. 289.
Feibelman vs. Packard, 108 U. S., p. 14.
Simpson vs. Greely, 20 Wall., p. 152.
Davenport vs. Fletcher, 16 How., p. 142.
Smyth vs. Strader, 12 How., p. 327.
Trust Co. vs. Gas Co., 95 Fed. Rep., 49.
Estis vs. Traube, 128 U. S., 225.
Trust Co. vs. R. R., 58 Fed. Rep., 6.

We submit the judgment obtained by defendant in error, being a judgment for all the land recovered against Thomas Price and E. M. Ayres, and Ayres alone suing out the writ of error, that under the authorities just cited, this was sufficient to sustain the motion for the dismissal of

the writ of error, as the Court of Appeals had no jurisdiction in the matter.

The rule was established to provide for just such cases as the one at bar.

In the first place all joint defendants against whom a judgment is rendered—that is, all having a right to question the entire judgment—should be made to join in a writ of error, or appeal, so that the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. And, second, in order that the joint defendants may be estopped from litigating the same questions again, and thus force the appellate tribunal to decide a second or third time the same question on the same record.

If it were not for this rule, after the determination of this writ of error, sued out by Ayres, there would have been nothing at all, unless it was the statute limiting the suing out of a writ of error, restraining Price, his co-defendant, from litigating the same questions at another term of the Court, if he so desired. This is what the Federal Courts, in making the above rule, have attempted to avoid. Those Courts have gone even further in providing for the contingency where a joint defendant refuses to join in a writ of error or appeal. In such cases it is the rule that the defendant who wishes to prosecute the writ of error or appeal has a remedy against his co-defendant who refuses to join in the same, known technically as the remedy by summons and severance. It is a remedy allowed where more than one person are interested jointly in a cause of action, and one of them refuses to proceed in the legal assertion of the joint rights involved in the matter. In such cases, the other party issues a writ of summons by which the one who refuses to proceed is brought before the Court, and if he still refuses, an order or judgment of severance is made by the

Court whereby the party who wishes to do so can sue alone.

One of the effects of this judgment of severance is to bar the party who refuses to proceed from prosecuting the same writ or an appeal in another action.

The defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature.

There is nothing in the record, however, showing that the defendant, Price, refused to join in the writ of error, or that he knew anything of it.

But we insist that if Price had known of the writ, and had failed to join therein, that the writ of error of Ayres was nevertheless properly dismissed, on account of the fact that no notice was served on Price to join in it—there was no severance of the cause as to him.

We do not here confine ourselves to the technical mode of proceding by summons and severance.

No doubt the writ of error would have been good if it had appeared in the record in any way that Price had been notified, in writing, to appear, and that he had failed to appear, or if appearing, had refused to join.

There is, however, no such notice set out in the record, and there is even no allegation of the same in the petition of Ayres.

Before this writ of error could stand, it must unquestionably have appeared on the face of the record that there was a written notice, and that due service of the notice was made on the defendant, Price, or the record must show his appearance and refusal to join in the writ, and that the Court on that ground allowed the writ of error to Ayres, who alone applied for it, as to his own interest.

As this did not appear the writ of error was properly dismissed.

Masterson vs. Herndon, Supra.

Hardee vs. Wilson, Supra.
Inglehart vs. Stansbury, 151 U. S., p. 72.
Slipperly vs. Smith, 155 U. S., p. 86.
Williams vs. United States, 11 Wheaton, p. 414.
Owings vs. Kincannon, 7 Pet., p. 399.
Todd vs. Daniel, 16 Pet., p. 521.
Beardsley vs. Ry. Co., 158 U. S., p. 123.
Trust Co. vs. Clark, 83 Fed. Rep., p. 230.
Trust Co. vs. McClure, 78 Fed. Rep., p. 211.
Dodson vs. Fletcher, 78 Fed. Rep., p. 214.
Wilson vs. Insurance Co., 12 Pet., p. 140.

In the case of Short vs. The Columbia, 67 Fed. Rep., p. 944, the rule is laid down as follows: When an appeal is taken (and we have seen that both appeals and writs of error follow the same rule), it is essential to the jurisdiction of the Appellate Court, that each party, having a right to be heard upon a review of the case, should be brought before the Court, or lawfully estopped from continuing the litigation.

It is undeniable that defendant Price had rights that should have been heard on the writ of error, if he so desired, but if he did not wish these reviewed, then he should have been brought before the Court and put in a position to be lawfully estopped by law from continuing this litigation in the future, and, as this was not done, the Court had no jurisdiction to try the writ of error.

The facts in the record show that Price would have had the greatest interest in reversing the judgment, if it could have been done. Polsdorfer, in the lower Court, sued both Price and Ayres for certain tracts of land, not designating that any particular ground was claimed separately by either, but suing both for the whole, and both of them defended as to the whole, and the judgment rendered below was against Price and Ayres equally for the whole, no

specified body of land being designated to be recovered from each.

Price and Ayres were claiming the whole of the same ground as Polsdorfer and wife, each setting up respectively claims hostile to Polsdorfer, to the whole of the land sued for. These claims in the lower Court were adjudicated against the two, and Ayres alone sued out the writ of error to have the judgment of the lower Court reviewed in the Court of Appeals, *only* with respect to the controversy as between him and Polsdorfer and wife.

The record also shows that Price asserted a claim of title to all the land as positively as Ayres, and the judgment below was rendered against the two. Price had the right to question the judgment on error as to all the land, equally with Ayres. This being the case, Price undoubtedly should have been made a party to the writ of error, or have been put in a position to be estopped in the future from setting up an error, which, if it existed, should have been passed on and corrected finally upon the writ of error sued out by Ayres.

The case nearest in point to the one at bar is the case of Masterson vs. Herndon, cited above. This was a case where certain parties filed a bill of peace and for the conveyance of a pretended title to a tract of land described, against S. A. Maverick and J. H. Herndon. On that bill the Court decreed that the complainants "have and recover of the said S. A. Maverick and the said J. H. Herndon the tract of land in the bill described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by the said defendants."

From this decree Herndon appealed. In regard to Maverick, the petition was thus: "Your petitioner says that his co-defendant, Maverick, refuses to prosecute this

appeal with him." There is nothing of the kind in the petition here.

Comparing this case to the case at bar, we find they are virtually the same, though the case at bar is in substance an action of ejectment, and the other was a suit in equity for the conveyance of a pretended title. The judgments in both cases were joint judgments, in the sense that they concluded the rights of both the defendants, as appears on the face of each judgment.

The petition filed in the case at bar, as stated before, made no mention in any way, nor did it appear in the record that Price was notified of the writ of error having been sued out, or was consulted about it, or that he refused to join in the same.

This, then, is a stronger case even than that presented in the case of Masterson vs. Herndon. That case was before the Supreme Court on a motion to have the appeal dismissed, and Mr. Justice Miller, for the Court, after stating the facts as above set out, and after going into the case thoroughly, held that the motion was well taken, and the appeal should be dismissed.

The Court of Appeals had no jurisdiction to try this cause, and, if the motion had not been filed, that court would have, even on its own motion, dismissed the case.

Estis vs. Traube, 128 U. S., p. 226.

Also: Trust Co. vs. Longworth, 76 Fed. Rep., p. 609.

Trust Co. vs. Kilbourne, 76 Fed. Rep., p. 883.

Davis vs. Trust Co., 152 U. S., p. 590.

Gray vs. Havemeyer, 53 Fed. Rep., p. 174.

Dolan vs. Jennings, 139 U. S., p. 385.

Railroad Co. vs. Sweeney, 95 Fed Rep., p. 395.

In conclusion, as our answer to the brief of counsel for plaintiff in error in opposition to this motion, we beg to

quote from the opinion of the Court of Appeals, as the learned Judge delivering that opinion concisely demonstrates the insufficiency of every defense set up:

"It is earnestly insisted by counsel for the plaintiff in error that this case falls within the class of cases last mentioned, because it appears that Ayres and Price founded their claim to the land upon wholly distinct and antagonistic titles. But it was the land itself which was the subject of the suit, and the titles which each of these defendants advanced amounted to no more than separate means to a joint defense. Each of these means was also available to both defendants, for the plaintiff must recover upon the strength of his own title as against all others. The rule is that separate pleas and separate defenses, founded upon distinct sources of right, do not make the judgment several, when they are brought forward in defense of a single cause of action, upon whch the judgment is recovered."

See: R. R. Co. vs. Ide, 114 U. S., 52.

Pirie vs. Tvedt, 115 U. S., 41.

Merchants' &c. Co. vs. Ins. Co., 151 U. S., 383.

"The *res* is not thereby divided. In many of the cases already cited there was no unity of title between the parties bound by the judgment from which the appeal was taken—cases wherein the appeal was held ineffectual, because parties not joined had an interest in the question whether the judgment should stand or be reversed.

"Counsel for plaintiff in error further urges that before the objection was brought forward the time for taking a writ of error by Price had expired, and that therefore he is as effectually precluded as if he had originally been summoned and had refused to join, and further, that no right of the plaintiff has been delayed by his non-joinder. This answer is plausible, but it does not reach the root of the matter, which is treated as one of jurisdiction. This must

be tested by the conditions existing at the time when the writ was sued out. The action had not then been severed, and, for aught that then appeared, Price might also take out a writ. And it is clear that, if the present writ was ineffectual to remove the case, it could not be made valid by mere lapse of time and the coming on of subsequent conditions." Citing:

Mattox vs. U. S., 156 U. S., 237, 15 Sup. Ct., 337, 39 L. Ed., 409.

Wilson vs. Insurance Co., 12 Pet., 140, 9 L. Ed.,1032.

Estis vs. Traube, 128 U. S., 225, 9 Sup. Ct., 58, 32 L. Ed., 437.

Inglehart vs. Stansbury, 151 U. S., 68, 14 Sup. Ct., 237, 38 L. Ed., 76.

"The bill of exceptions was tendered by Ayres alone. The pleadings are in the statutory form, and the judgment simply responds to them. So far as we can see, no question could arise upon the record proper; and, as Price did not procure the settlement of a bill of exceptions in his behalf, there is perhaps some ground for saying that he was already disabled from prosecuting a writ of error, and that therefore a summons and severance would have been a futile performance. But, at the time when this writ of error was taken, Price, if he could not avail himself of the bill of exceptions which Ayres had procured to be settled, was not, so far as we know, debarred from procuring the settling of a bill in his own behalf, and joining in the writ of error and assigning errors thereon.

"Stress is also laid upon the fact that by the language of the judgment it is adjudged in terms 'that the plaintiffs do have and recover of and from the defendants severally,' etc. But we think it manifest that, in substance and effect, the judgment operated against them jointly, conforming to the declaration and the verdict. In Hampton

vs. Rouse, 13 Wall., 187, 20 L. Ed., 593, the verdict was jointly against two defendants, but the judgment was in form against the one who brought the case up. The reporter states that the Court held this a mere clerical error. The writ of error was dismissed for the non-joinder of the other defendant."

Besides, Price and Ayres were sued jointly, as individuals in an action of trespass or tort, and not as co-partners in a contract. They each defended as to all the land sued for. Whether the judgment was in terms against them jointly, or against the two, or against each severally, its effect and the result were the same. The verdict found Polsdorfer and wife were entitled as against both and each to all the land. And when the judgment in words expressed the recovery as against them severally for the whole, it merely simplified, according to the fact, what had been done, namely, Polsdorfer and wife receovered severally from each, and therefore, from both, the land sued for. In every case of tort or trespass, the judgment of recovery, unless otherwise expressed in it, is joint and several, against each defendant found liable.

2 Black on Judgments, Sec. 777.

And this Court has held that a judgment on a cause of action arising out of a contract merely joint of several persons, against one of the several, at common law, merges the entire cause of action, and bars an action against the others.

Mason vs. Eldred, 6 Wallace, 231.

We are not aware of any change in the common law as to the extent of the liability of persons guilty jointly of torts or trespasses, or in judgments against several, in actions based on them, by statute in Tennessee. And the authorities agree that there is such privity between the defendants in a judgment in an action based on a tort or

a trespass that satisfaction of such judgment as to one of the defendants, is a satisfaction as to all, and is a bar to an action against the other tort feasors or trespassers, jointly liable with the defendant making the satisfaction, but not parties to the judgment.

Lovejoy vs. Murray, 3 Wallace, 10-17.

These principles furnish additional reasons why Ayres should have joined Price in his writ of error, or should have given him notice of it, and should not have ignored him.

ON THE MERITS OF THE CASE AS PRESENTED IN THE CIRCUIT COURT.

Perhaps we should not entirely ignore the learned and labored argument presented in this Court by counsel on behalf of the plaintiff in error, on what he seems to consider the merits of the case of the plaintiff in error in the Circuit Court, though it seems to us to undertake an answer is a mere waste of time.

We call attention to a few undisputed facts in the record which we submit render any further reply unnecessary.

In the year 1837, the State of Tennessee, by Grant No. 3245, granted Wm. W. Woodfolk 5,000 acres of land, fronting along the east bank or margin of the Mississippi river, in Lauderdale county, Tennessee, 640 poles, or nearly two miles, and making that river the west boundary of the tract. (Record, pp. 13-14.)

There were other smaller similar grants fronting along the river, but they are not material here, as the land Ayres claims is all in front of the grant to Woodfolk.

In the year 1867, Woodfolk conveyed to Joe C. Marley (Record, pp. 15-17.)

By conveyances from Marley and those claiming under him, Polsdorfer, on the 12th of July, 1892, acquired the

title in fee to the 5,000 acres granted Woodfolk. These conveyances called for the main channel of the Mississippi river, as a boundary, and embraced all the accretions which had formed from the river between 1837, the date of the grant to Woodfolk, and the date of the conveyances to Polsdorfer. (Record, pp. 30-35.)

After he had obtained the deeds, Polsdorfer immediately took possession of the land, and he remained in possession until October 15, 1898, when he begun this suit. (Record, p. 63.)

The suit was brought under the statute of Tennessee, Shannon's Code, Sec. 4970 (3229), which provides: "Any person having a valid subsisting legal interest in real property, and a right to the immediate possession thereof, may recover the same by an action of ejectment."

The allegation in the declaration was that Polsdorfer and wife were in possession and entitled, and Ayres and others, the defendants, unlawfully and without right entered upon the lands, and falsely and unjustly set up title thereto in themselves, and cut and removed timber therefrom, and exercised acts of ownership under their false claim of title, and denied, and refused to recognize the title and the possession of Polsdorfer and wife. (Record, pp. 2-4.)

The right to maintain the suit in such a case is settled by the decisions:

Langford vs. Love, 3 Sneed, 308.

Smith vs. Lee, 1 Coldwell, 551.

Padgett vs. Baker, 1 Tennessee Chy., 222.

West vs. Lanier, 9 Humphreys, 762.

The declaration described the lands as situated in Lauderdale county, Tennessee, and the territorial jurisdiction of the Circuit Court of the United States for the Western Division of the Western District of Tennessee, in which

the suit was brought, is bounded by the thread of the main channel of the Mississippi river, fixed by the Constitution of the State of Arkansas, and the Constitution and statutes of the State of Tennessee, respectively, as the boundary between the two States.

Constitution of Tennessee of 1796, Art. 1, Secs. 29 and 31.

Constitution of 1834, Art. 1, Secs. 29 and 31.

Constitution of 1870, Art. 1, Secs. 29 and 31.

Shannon's Code, Sec. 80 (69.)

Constitution of Arkansas of 1836, Art. 1.

Constitution of 1861, Art. 1.

Constitution of 1864, Art. 1.

Constitution of 1868, Art. 2.

Constitution of 1874, Art. 1.

And before the treaty of 1803, by which the French Republic ceded the Louisiana Territory to the United States, the thread of the main channel of the river had formed the boundary line, first between Spain and the American Colonies and States, and afterwards between them and France.

In his pleas, Ayres did not deny the local jurisdiction of the Court, nor dispute the allegation in the declaration that the land sued for was situated in Lauderdale county, Tennessee. He pleaded only, (1) not guilty, and (2) the Statute of Limitations of seven (7) years. (Record, p. 7.)

Statutes of Tennessee provide as follows:

"The defendant may plead that he is not guilty of unlawfully withholding the premises claimed by the plaintiff, and upon such plea may avail himself of all legal defenses."

Shannon's Code, Sec. 4980 (3239.)

"Such plea admits that the defendant is in possession

of the premises sued for, unless he states distinctly upon the record the extent of his possession."

Shannon's Code, Sec. 4981 (3240.)

"All allegations in the declaration, not denied in the plea, shall be taken as true for all the purposes of that issue."

Shannon's Code, Sec. 4631 (2910.)

And see: Lee vs. Slatterly, 7 Baxter, 235.

Ayres therefore admitted the locality of the premises sued for, and the jurisriction of the Court to try the title to them.

It is not disputed in the record anywhere that the land sued for is on the east or Tennessee side of the thread or main channel of the Mississippi river, and is immediately in front of, and attached to the river front of the 5,000 acres granted to Woodfolk by the State of Tennessee, in the grant of 1837. It is so located and situated that, if detached or separated from that 5,000 acres, as it was in 1837, when the grant to Woodfolk was made, and the river bank as it was then is made the boundary of the 5,000 acres, no part of such 5,000 acres would front upon or touch the margin of the river or water line as it is now, but it would be cut off and excluded from access or approach to the river by the formation or accretion in front of it, constituting the land sued for, of from a half mile to two miles in width or extent.

Neither has the State of Arkansas ever in fact exercised jurisdiction or claimed sovereignty over the land sued for. The only pretext set up by Ayres as the exercise of such jurisdiction, or claim of sovereignty on the part of that State, consists in the isolated fact that its revenue officers undertook to assess certain lands for taxation, and levy and collect taxes on them, naming them as parts of certain sections, designated as in a certain township and

range, conforming to the public surveys of the United States, and to sell such lands, so described, for the non-payment of such taxes, and then to make the deeds under which Ayres claims, to the purchasers at such sales. (Record, pp. 145, 152 and 155.)

The State of Arkansas, however, did no act to fix the location of the lands its revenue officers undertook to sell and convey, and at no time attempted to put Ayres or any one in possession under the sales and purchases.

The first deed was made by McVeigh, as Commissioner in Chancery for the Circuit Court of Mississippi county Arkansas, under a sale pursuant to a decree of that Court, in a suit by the State and Mississippi county, brought *in rem* against certain lands on which taxes were alleged to be due. The lands were described in that deed as lying in Mississippi county, Arkansas, and as all of Section 17, T. 12, R. 12 E., 122 acres; all of Section 18, T. 12, R. 12 E., 35 acres; all of Section 19, T. 12, R. 12 E., 81 acres; and all of Section 20, T. 12, R. 12 E., 18 acres—in all 256 acres, and the purchase price was $8.74. The sale was made at Osceola, Ark., on the 4th day of February, 1883, and the deed was dated the 22d of July, 1884. (Record, pp. 145-146.)

The other deeds, four in number, were all made by the Clerk of the County Court of Mississippi county, Arkansas, and dated the 30th of June, 1897, under sales to pay taxes levied by the State of Arkansas and Mississippi county for the year 1894. Ayres was the purchaser at the sales. One deed conveyed him all Section 20, T. 12 N., R. 12 E., 18 acres, for the taxes, penalty and costs, amounting to $1.17. (Record, p. 152.) Another conveyed him Section 17, being 35 acres; another Section 18, being 81 acres, and the last Section 19, being 122 acres, each for the taxes, penalty and costs due on it. (Record, p. 155.)

The deeds stated were the only sources of title relied on by Ayres. (Record, pp. 219-220.)

Under these deeds, Ayres claimed all the accretions up to the original bank, or bank in the year 1837, of the Mississippi river, in Tennessee, around the original Flower Island, as he termed the island in the Mississippi river, and running up the river along the Tennessee side, from Fort Pillow to Plum Point, about thirteen (13) miles. (Record, pp. 223 and 226-227.)

Ayres introduced in evidence two patents from the United States, and a map of the survey of the lands from the General Land Office of the United States, made on the 3d day of March, 1825, being a map and survey of fractional Sections 17, 18, 19 and 20, Township 12 North, Range 12 East.

The first patent is dated February 1, 1843, and was based upon an entry at United States Land Office, at Helena, Arkansas. It showed that D. Hardiman had made payment under the Act of Congress for fractional Section 18 and fractional Section 17 (on island), in Township 12 North, Range 12 East, in the district of lands subject to sale at Helena, Ark., containing 158.01 acres, according to the official plat of the survey of the land returned to the General Land Office, and therefore the United States conveyed him the lands.

The other patent was dated on the 12th day of March, 1847, (mistake in Record says 1857.) This patent recited payment by John C. Barnes, under the Act of Congress for fractional sections 19 and 20 (on island), in Township 12 North, Range 12 East, in the district of lands subject to sale at Helena, Ark., containing 99.70 acres, according to the official plat of the survey returned to the General Land Office, and therefore the United States conveyed him those lands by the descriptions stated. (Record, pp. 229-231.)

The patents established (1) that the lands patented were on the west, or Arkansas side of the thread of the main channel of the Mississippi river, and that the stream was between the island on which the lands were and the Tennessee shore, and (2) that the lands and the island were not in the State of Tennessee, nor any part of its territory. These facts are true, because the United States in acquiring the Louisiana Territory in that locality and far above and below that point on the Mississippi river, acquired jurisdiction and title only to the thread of the main channel of the Mississippi river, the jurisdiction and title to the lands on the other side of such thread having been, from the settlement of the thirteen (13) Colonies, in North Carolina, and afterward in Tennessee. And it is a well-known fact that North Carolina and Tennessee owned and granted all the lands bordering the Mississippi river on its east side, within the limits of the present State of Tennessee, except a few miles just south of Memphis, in Shelby county, where there was a mistake in the line between Tennessee and Mississippi, and the lands were surveyed and portions sold by the United States before the mistake in the line was rectified. These titles have been recognized and the territory or district is known as "The Strip."

All the witnesses agree that there is not now, and has not been for many years, any island on the Arkansas side of the thread of the main channel of the Mississippi river corresponding with, or answering the description of the island containing the lands the United States patented to Hardiman and Barnes. And all of them agree that the main channel of the Mississippi river, so far as they have known or observed it, has always been to the westward of the lands in controversy in this suit, or between those lands and the Arkansas shore.

Tennessee has always claimed sovereignty and exercised jurisdiction over the land, the 5,000 acres originally granted to Woodfolk, and all the accretions thereto, including the lands in controversy, in this suit, and such accretions and lands in controversy, are all between the original Tennessee shore, or east bank of the Mississippi river in the year 1837, and the thread of the main stream or channel of that river. The island on which the lands patented to Hardiman and Barnes were located commenced to wash away, and a mud bar to form on the Tennessee shore across the main channel from the island, probably as early as 1839. The formation or accretion to that shore continued until it reached its present proportions, the Mississippi river being all the time between it and the opposite Arkansas shore. The island probably disappeared as early as the year 1850, or before that time, being washed away by the river. (Record, pp. 70-87, and pp. 119-124.)

And as the accretion was added and became a part of the Tennessee shore, the land thus acquired was treated as the other land on the bank of the river, and a part of the State. The lands were assessed for taxation, and the taxes paid. (Record, pp. 68, 43 and 140.)

Suits were brought with respect to the possession of the land, and process executed upon it. (Record, pp. 140 and 45-48.)

Assuming that the accretions belonged to the State of Tennessee and not to the riparian owners, the State in the year 1894, made two grants of portions of them, and including the land in controversy, or a part of it, one to Thomas Price, one of the defendants, and the other to T. A. and E. J. Roy, two others of the defendants. (Record, pp. 114-117.)

Aside from the position that Ayres, in this suit, upon his plea, is not entitled to raise, or have the benefit of any

question of State boundary, or question whether the premises are or ever were a part of the territory of, or within the State of Arkansas, or subject to its disposition, the fact that the State of Tennessee is in possession, and is in the exercise of sovereignty and jurisdiction over the land sued for, is conclusive of those questions for the purposes of the present suit. This Court alone, in an original suit, between Arkansas and Tennessee as States, has jurisdiction of the question of boundary. It cannot be settled by judicial determination in this suit between Ayres and Polsdorfer. For the purposes of this suit the land is in Tennessee, and no question as to that fact can be tried before any jury in the course of it. The question is not judicial, but political, and the Courts must follow what the States respectively, or those who represent them in their legislative and executive departments, establish or acquiesce in, with respect to the fact of actual possession, or occupation, and sovereignty and jurisdiction.

Jones vs. United States, 137 U. S., 212, etc.

If the fact be conceded that the premises in controversy occupy in part or wholly the position or locality of the island which has been washed away, on which the lands patented to Barnes and Hardiman by the United States, or the lands described in Ayres' tax deeds at one time, were situated, or if the locality of such premises was in fact at one time in the State of Arkansas, yet if it is true that by the recession of the Mississippi river, or the accretion from it to the Tennessee shore, the thread of the main channel of the river has been so diverted and changed that such thread is now to the west of that locality, namely, the former island, and the change has placed in Tennessee what was in Arkansas, that is to say, if such locality, with reference to the thread of the stream, is now on the east side of it, or toward the original Tennessee shore, then such

locality or the premises in controversy are in Tennessee, the same as if there had never been any change of the thread of the stream, and as if they had never been in Arkansas.

Nebraska vs. Iowa, 143 U. S., 359.

Iowa vs. Illinois, 147 U. S., 1.

Keokuk & Hamilton Bridge Co. vs. Illinois, 175 U. S., 626.

In Arkansas, it has been decided that if the Mississippi river washes an island away, and the locality becomes a part of the bed of the river, the title of the former owner is thereby extinguished, and the ground under the water becomes the property of the State of Arkansas, in trust for the public, the same as the rest of the bed of the river, and if, years afterwards, land forms or reappears above the water, at the place where the original island was, such land does not become the property of the owner of the land at the time the island was washed away, or of those claiming under him, or the private property of any one, but remains the public property, and vested in the State in trust for the public.

Wallace vs. Driver, 61 Ark., 429.

The fact is admitted by Ayres, and his whole defense is based on it, that the land he claims was at one time west of the thread of the main channel of the Mississippi river, and in Arkansas, and his position in this suit is that he can hold such land now, when the thread of the stream has so changed that the land is east of it, and in the State of Tennessee. His position further is that although the United States only patented Hardiman and Barnes together 257.71 acres, and the land patented consituted an island, but a few hundred yards in length or width, on the Arkansas side of the thread of the main channel of the Mississippi river, and his purchase at the sales for taxes only

embraced in terms the same lands, and the same island, and the same area that Hardiman and Barnes acquired, he can hold as his, the island, or the land, that is the premises on the Tennessee shore, sued for in this action, though they are now on the east or Tennessee side of the thread of the main channel of the river, and are joined to, and form a part of the Tennessee main land, and though they extend along the Mississippi river many miles, and far above, and far below, on the river, the original island patented to Hardeman and Barnes, and sold and purchased at the sales for taxes under which he claims.

In St. Louis vs. Rutz, 138 U. S., 236, this Court decided:

(1) The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river as such riparian proprietors.

(2) The law of title by accretion can have no application to a movable island, traveling for more than a mile, and from one State to another, for its progress is not *imperceptible*, in a legal sense.

138 U. S., 250-251.

Admitting these propositions, Ayres has, it seems to us, nothing to stand on in this case.

We have already called attention to the fact that Polsdorfer and wife were in possession of the premises involved in this suit, at the beginning of the suit, and that they sued, under the Statute of Tennessee, for the unlawful interference by Ayres with their possession and title. The suit is somewhat similar to West vs. Lanier, 9 Humphreys, 762, which was decided before the statute referred to above was enacted.

The jury by its verdict has found the possession to be in Polsdorfer and wife.

Conceding that Polsdorfer's possession did not give him a perfect legal title, it did give him a sufficient title to maintain this suit against Ayres, if the fact appears in the record, as we submit it does, that Ayres showed by the pleadings and proof no title, and no substantial claim of title in himself to the land, or to any part of it. He made no claim under a grant from North Carolina or Tennessee, or any one claiming under either of those States. He sets up a claim of title only under the sales for taxes in the State of Arkansas and the deeds based thereon, and the lands are not, and never were in the State or Arkansas or subject to its jurisdiction.

In Christy vs. Scott, 14 Howard, 282, this Court decided that "a mere intruder cannot enter on a person seized, eject him, and when sued, question his title, or set up any outstanding title in another. The prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title."

And in Burt vs. Panjaud, 99 U. S., 180, it was decided that "in ejectment, or trespass, *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor prior to his eviction is *prima facie* evidence of title, on which he can recover against a mere trespasser."

The cases were reviewed, and the rule announced again in Sabriego vs. Maverick, 124 U. S., 261, 296-297.

The cases in Tennessee are to the same effect.

Garners Lessee vs. Johnston, Pecks R. 24.

Swan vs. Castleman, 4 Baxter, 257.

The State of Arkansas, as the Court below, and this Court judicially know, was incapable by law of granting the land in controversy, situate in Tennessee, and under the actual exercise of its jurisdiction, and therefore the deeds purporting to be made upon the sales for taxes, levied under the assumed authority of that State, were properly

disregarded, and treated as void on the trial in the Circuit Court.

United States vs. Reynes, 9 Howard, 127.
Kennett vs. Chambers, 14 Howard, 38, 50.
Hoyt vs. Russell, 117 U. S., 401.
Coffee vs. Groover, 123 U. S., 1.
Deffeback vs. Hawke, 115 U. S., 392.
Redfield vs. Parkes, 132 U. S., 239, 250-251.

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